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No. 34

In the

Supreme Court of the United States

OCTOBER TERM, 1953

UNITED STATES OF AMERICA, INTERVENOR,
Petitioner,

v.

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, LTD., and SUNNYLAND WHOLESALE FURNITURE COMPANY,
Respondents.

REPLY BRIEF FOR RESPONDENT, LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, LTD.

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No. 642

In the

Supreme Court of the United States

OCTOBER TERM, 1953

UNITED STATES OF AMERICA, INTERVENOR,
Petitioner,

v.

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, LTD., and SUNNYLAND WHOLESALE FURNITURE COMPANY,
Respondents.

REPLY BRIEF FOR RESPONDENT, LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, LTD.

STATEMENT

As far as it goes, the statement made by Petitioner in its Brief, pages 2-5 is correct. However, Petitioner has omitted certain facts which this Respondent feels deserve some attention.

The original Writ of Garnishment was served upon the Respondent, The Liverpool & London & Globe Insurance Company before the fire insurance policy became due and payable (R. 9). The policy proceeds were not due and payable to the assured, D. Ray Adams, or any other person

until on or about September 24, 1952 (R. 36). The money was paid into the registry of the Court and accepted by the Judge of the Court on September 1, 1952 (R. 41-42).

RESPONDENT'S COUNTER POINT NO. 1

The court below did not err in awarding attorney's fees payable to counsel for the garnishee out of the funds deposited with the District Court.

ARGUMENT

This Respondent has no interest in the first specification of error urged by the Government in its brief, and therefore will not undertake to answer that portion of the brief.

Counsel for the Government has never cited any authority for its proposition that the attorney's fee should not be allowed out of the funds placed in the registry of the Court by this Respondent. By some method, it apparently attempts to place itself in a position different from a private litigant in this respect.

Basically, from the standpoint of the Liverpool & London & Globe Insurance Company, it must be remembered that at the time of the fire, which gave rise to its obligation under its insurance policy, it owed neither the United States Government nor Sunnyland Wholesale Furniture Company, its obligation if any being to D. Ray Adams, its insured. At all times, it admitted its liability and in order to avoid either a multiplicity of suits or a multiplicity of liability, after the garnishment and notice of tax lien were served upon it exercised its rights in the garnishment proceedings of interpleading the United States Government

and asking that it be discharged upon its answer and be allowed its cost and attorney's fees. *Rule 64, Federal Rules of Civil Procedure*, provide that an action of this character, upon removal to a Federal Court for any reason shall retain such character. *Cyclopedia of Federal Procedure, Third Edition, Section 71.46.*

That an attorney's fee may properly be allowed to the Garnishee, such fee to be paid out of the fund deposited with the Clerk of the Court is clear, under Texas law. *Texas Rules of Civil Procedure, Rule 77, (formerly Article 4100, Revised Civil Statutes, 1925), Sorenson v. City National Bank, 49 S. W. 2d 718, 121 Tex. 478; Vassiliades v. Theophiles, 115 S. W. 2d 1220, Writ of Error Dismissed; May v. Donaldson (Tex. Civ. App.), 141 S. W. 2d 702; Hirsch v. Dearing (Tex. Civ. App.), 151 S. W. 2d 949; Johnson v. Blanks, 4 S. W. 557, 68 Tex. 495.*

We specifically wish to call to the attention of this Court the statement in *Vassiliades v. Theophiles*, supra, wherein it is specifically held that the payment of such attorney's fees should be made out of the fund in controversy.

To the same effect is *Halloran v. Abilene State Bank (Tex. Civ. App.), 15 S. W. 2d 1056.*

Counsel for the Government has not cited and we are unable to find any statute which would prohibit the payment of this attorney's fee. The payment of an attorney's fee to an interpleader when the Government is claiming a tax lien is not without precedent however. *United States v. Ullman (District Court, Eastern District, Penn.), 115 Fed. Supp. 211.* In that case, the Government was claiming

a tax lien against Mr. Ullman and filed a notice of it with an insurance company who then interpleaded both its insured and the Government asking for an adjudication of the rights of the parties. The District Judge in a very well reasoned opinion decided that there was no prohibition either in law or in equity against the allowance of an attorney's fee out of the fund tendered into the Court.

We feel it would be an imposition upon this Court to further extend the discussion of the Texas law as applied to this situation, therefore will content ourselves with the citation of the following authorities, which when read with the others already adverted to, should amply sustain the Honorable District Judge in allowing the attorney's fee. *Century Ins. Co. v. First National Bank, 102 F. 2d 726, 133 F. 2d 789; Nixon v. Malone, 98 S. W. 380, 100 Tex. 250; Employers Casualty Co. v. Rockwall County, 35 S. W. 2d 690, 120 Tex. 441; Greer v. Franklin National Life Ins. Co., 221 S. W. 2d 857, 148 Tex. 166; Wilke v. Finn (Comm. of App.), 39 S. W. 2d 836.*

Finally, as a matter of equity it would appear to us that a company in the position of Respondent, admitting its responsibility at all times should not be forced to the expense of paying its own attorney's fee. The sole purpose of allowing an attorney's fee in a case of this character is to place the cost of litigation upon the parties primarily responsible for it.

Additionally, it must be recalled that the insured, D. Ray Adams was made a party defendant. No costs were adjudged either against the United States or D. Ray Adams. There

is no showing in the records that Mr. Adams is insolvent and could not respond for the payment of the costs. See *Vassiliades v. Theophiles*, supra.

CONCLUSION AND PRAYER

It appears to this Respondent that that part of the judgment having to do with the payment of the attorney's fee is obviously correct and should be affirmed.

WHEREFORE, Respondent, The Liverpool & London & Globe Insurance Company prays that the application for Writ of Certiorari be in all things denied and if the same be granted, that the case be in all things affirmed.

Counsel for Respondent, The Liverpool & London & Globe Insurance Company hereby expressly waive the right of personal appearance and oral argument should this case be heard by the Court. Counsel further informs the Court that if the application for Writ of Certiorari be granted, it will elect to stand upon this brief upon the merits of the case.

Respectfully submitted,

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I hereby certify that copies of this brief have been served upon the Honorable Simon E. Sobeloff, Solicitor General, United States Department of Justice, Washington 25, D. C., Counsel for Petitioner and also upon Mr. James E. Alexander, Fidelity Union Life Building, Dallas, Texas, Counsel for Respondent, Sunnyland Wholesale Company.